Supreme Court, U.S.
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NO. 84-279

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES MARINE SERVICE, INC.,
Petitioner

verus

RYAN WALSH STEVEDORING COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RANDOLPH J. WAITS
FRANCIS EMMETT
JAMES A. COBB, JR.
EMMETT, COBB, WAITS & KESSENICH
1515 Poydras Street, Suite 1950
New Orleans, Louisiana 70112
(504) 581-1301
Attorney for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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RESPONSE

I.

PETITIONER RAISES A PHANTOM ISSUE

The Lower Courts did not rely on the Doctrine of Last Clear Chance to find Petitioner solely at fault. The District Court in the first instance did not find the derrick barge to be unseaworthy, but only applied the Last Clear Chance Doctrine *arguendo.*

The District Court said:

> "Under traditional principles of maritime law, once the master of the M/V HIAWATHA took over the D/B FRANK L without knowing the height of the boom or the vertical clearance of the bridge, all responsibility for the safe conduct of the

> voyage shifted to him. He could have made the decision either to get the requisite information or, failing that, not to proceed with the tow. *Houma Well Service v. Capt. O'Brien*, 312 F Supp 257 (E.D. La.) at 262; *The City of New York v. McAllister Brothers, Inc.*, 299 F.2d 277 (CA 2 1962); *N.Y. Thruway Authority vs. Merritt-Chapman*, 1969 AMC 375, 380 (S.D.N.Y.); *Linde-Griffith Const. Co. v. Tug Authentic*, 1952 AMC 932, 934 (S.D.N.Y.)."

This is nothing but common sense. A tow does not have to help a tug figure out how to safely navigate. It is exactly what was held in *New York Thruway Authority*, 1969 AMC 375,379,380 (S.D.N.Y.). There the Court said:

> "I agreed with counsel for the Turecamo that at the very least a plausible arguement can be made to the effect that Merritt-Chapman was negligent or careless in not telling Olsen exactly what the height of the boom on the Chelsea was or perhaps even was careless in not anticipating that the height of that boom, whatever it was, was such to cause a problem and possible accident as the tow proceeded under the Tappanzee Bridge.
>
> "However, under traditional principles of maritime law, as I see it, once Rohde took over the tow and learned unequivocally from Olsen that Olsen, who was the man on the scene speaking for Merritt-Chapman, did not know this critical information, then the responsibility shifted to Turecamo, and Turecamo had the last chance and choice. Turecamo and its captain could have made

> the decision either to get the requisite information or, failing that, not to proceed with the tow.
>
> "Under all the circumstances, therfore, I conclude that the proximate cause and the full responsibility for the accident here must fall upon the shoulders of the Turecamo Boys, and a decree, accordingly, should be entered."

Each of these principles of towage law is appropriate to the facts of this case and the application of each or all would saddle the petitioner with sole fault for the collision. See, *The Law of Tug, Tow and Pilotage* (2nd Ed.) (1982) pp. 228, 229. "Tug's Duty to Unseaworthy Tow, Last Clear Chance Doctrine and Intervening Negligence."

In short, Respondent submits that the doctrine of Last Clear Chance is more a matter of causation than it is a matter of comparative fault, and unlike the Major-Minor Fault rule, it was not fashioned to avoid the harshness of the Moieties Rule, but rather as a shorthand method to express principles of causation. Hence, we further submit that the Last Clear Chance Doctrine survives *Reliable Transfer,* 421 U.S. 397 (1975), and that if its application were necessary in this case to support the conclusion of the District Court that the tug was solely to blame for the collision, then it is applicable.

II.

UNIFORMITY AMONGST CIRCUIT COURTS

The Last Clear Chance Doctrine has been adopted by the Fifth Circuit in *Dameron-White Co. v. Angola Transfer*

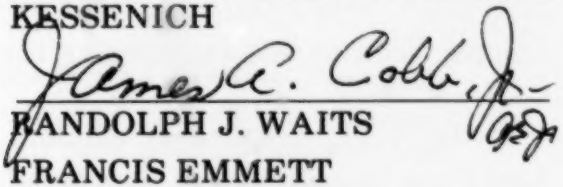
Co., 19 F.2d 12 (5th Cir 1927) and by the Second Circuit in *Henry Dubois Sons v. Penn. R.R. Co.*, 47 F. 2d 172 (2d Cir 1931).

CONCLUSION

The Lower Court did not rely on the Last Clear Chance Doctrine to find the Petitioner solely at fault. The opinions of the Lower Courts are correct. The law applied to the facts are correct and in keeping with well established Towage Law principles and accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EMMETT, COBB, WAITS & KESSENICH



RANDOLPH J. WAITS
FRANCIS EMMETT
JAMES A. COBB, JR.
1515 Poydras Street, Suite 1950
New Orleans, Louisiana 70112
Telephone: (504-) 581-1301

CERTIFICATE

I hereby certify that a copy of the foregoing has been served on all counsel of record by depositing same in the United States Mail, postage prepaid, properly addressed this 15th day of October, 1984.

James A. Cobb, Jr.

RANDOLPH J. WAITS

JAMES A. COBB, JR.